



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Lori H. Flanery
Secretary

April 29, 2011

No. 10-34

Michael M. Hirn, Esq.
Jason Nemes, Esq.
Dinsmore & Shohl LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

RE: Determination of Protest: Cleveland Construction, Inc./Eastern State Hospital Replacement Facility.

Gentlemen:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Cleveland Construction, Inc. ("Cleveland Construction") relating to the Trade Contract solicitation by D.W. Wilburn, Inc. ("Wilburn"), the Construction Manager for the Eastern State Hospital Replacement Facility.

FACTUAL BACKGROUND

On or about March 23, 2009, the Commonwealth of Kentucky ("Commonwealth" or "Owner") and Wilburn entered into a written contract entitled "Contract Between Owner And Construction Manager" ("Contract"). (Exhibit A to Wilburn's Response to Protest). The Contract was for the construction of the replacement of the Eastern State Hospital in Lexington. Contract, Exhibit A. Wilburn was responsible for the bidding of the Trade Contractors. Contract, Article 3.4(d).

On October 7, 2010, Cleveland Construction submitted a bid to Wilburn for Bid Package No. 9 – Metal Framing, Drywall and Ceilings. On November 18, 2010, Cleveland Construction learned that Wilburn had awarded Bid Package No. 9 to OK Interiors Corp.

On November 24, 2010, Cleveland Construction filed a protest to the award of the contract for Bid Package No. 9 to OK Interiors Corp. On December 20, 2010, Wilburn filed a response to the protest. By letter dated January 14, 2011, Cleveland construction filed a "supplement" to its initial protest.

DETERMINATION

After a review of the protest record consisting of (1) Cleveland Construction's protest, (2) Wilburn's response, (3) Cleveland Construction's "supplement" to the protest, and (4) the applicable statutes and regulations, the Secretary of the Finance Cabinet ("Secretary") finds and determines as follows:

The Secretary's jurisdiction "to determine protests and other controversies" is limited to those of actual or prospective bidders or offerors in connection with the solicitation or selection for award **"of a contract."** KRS 45A.285(1). The term "Contract" as used in KMPC is limited to **contracts with the Commonwealth.**¹ In this respect the KMPC limits the Secretary's jurisdiction to "contracts" concerning "all types of **state agreements**, including... construction."²

In this instance, the only "contract" over which the Secretary would have jurisdiction is the construction management contract³ between the Commonwealth and Wilburn as that is the contract in connection with the subject project which represents a procurement by the Commonwealth. However, this protest concerns an award of contract by Wilburn to OK Interiors Corp. Both Wilburn and OK Interiors Corp. are private entities. Neither is a state agency. Therefore, the contract at issue is not a "state agreement." The Secretary does not have jurisdiction under KRS 45A.285 to determine this protest since the protest does not involve a "state agreement."

Accordingly, upon review of the protest record, the Secretary has no jurisdiction over the protest of Cleveland Construction and, therefore, it is denied.

For the Secretary
Finance and Administration Cabinet
By Designation



Bill Riggs
Chief of Staff

cc: Doug Wilburn, D. W. Wilburn, Inc.

¹ See KRS 45A.030(7). Similarly, a "contractor" is defined as "any person having a **contract with a governmental body**" of the Commonwealth. KRS 45A.030(9).

² KRS 45A.010, KRS 45A.020 and KRS 45A.030 refer to "**purchasing by the Commonwealth**," "**public procurement**," "**procurement system of the Commonwealth**," and "**state procurement activities**."

³ Pursuant to KRS 45A.030, there are only two distinct kinds of construction managers: "construction manager-agency" and "construction manager-at-risk." Wilburn was procured as the latter. Pursuant to KRS 45A.030(6), "[c]onstruction management-at-risk" is defined as "a project delivery method in which the purchasing officer enters into a **single contract with an offeror that assumes the risk for construction at a contracted guaranteed maximum price** as a general contractor, and provides consultation and collaboration regarding the construction during and after design of a capital project..." The Legislature expressly intended that there would be a single purchase for all services for construction of a project and this would be evidenced by "a single contract."